No. 03-1156

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NANCY E. HARBERT,

Plaintiff-Appellee,

v.

HEALTHCARE SERVICES GROUP, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Colorado

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

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BRIEF FOR THE SECRETARY OF LABOR

AS AMICUS CURIAE

STATEMENT OF THE ISSUE

Whether the Secretary of Labor's regulation under the Family and Medical Leave Act, 29 C.F.R. 825.111(a)(3), which defines the statutory term "worksite" in the context of a joint employment

relationship to be the "primary employer's office from which the employee is assigned or reports" is valid.

INTRODUCTION AND STATEMENT OF INTEREST

The Secretary of Labor ("Secretary") submits this brief as amicus curiae, pursuant to Fed. R. App. P. 29, in support of the Appellee Nancy E. Harbert. The Secretary is responsible for the administration and enforcement of the Family and Medical Leave Act ("FMLA or "Act"), 29 U.S.C. 2601 et seq. See 29 U.S.C. 2616, 2617(b), (d). Pursuant to an express delegation of authority by Congress (26 U.S.C. 2654), the Secretary has promulgated regulations to implement the Act (see 29 C.F.R. Part 825). At issue in this appeal is the validity of the Secretary's regulation providing that, for purposes of determining whether an employee is eligible for leave under the Act, "when an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports." 29 C.F.R. 825.111(a)(3).

Before the district court, Harbert alleged that her employer, Healthcare Services Group, Inc. ("HSG"), violated the FMLA by denying her request for medical leave on the ground that she did not meet the FMLA's eligibility requirements, and by subsequently terminating her.

After determining that Harbert was jointly employed by HSG and by the nursing home where she worked, the district court held that at the time of her FMLA leave request, Harbert was eligible for FMLA leave pursuant to section 825.111(a)(3) because more than 50 employees were employed within 75 miles of HSG's regional office. In so ruling, the district court upheld the regulation as a proper exercise of the Secretary's authority to elucidate the term "worksite" contained in section 101(2)(B)(ii) (29 U.S.C. 2611(2)(B)(ii)) of the statute.[1] On appeal, HSG does not dispute its status as

[1] Section 101(2)(B)(ii) of the FMLA provides that an employee is ineligible for FMLA leave if she "is employed at a worksite at which the employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that

a joint employer, nor as the primary employer under the FMLA regulations,[2] nor that Harbert's worksite under the regulations is its regional office. Rather, HSG contends that, except for employees with no fixed workplace, such as employees who travel from point to point, the FMLA mandates that an employee's "worksite" is her regular workplace, and the Secretary's regulation to the contrary is thus ultra vires.

The Secretary has a substantial interest in defending the validity of her regulation. As the Secretary demonstrates below, the regulation defining the joint employment worksite is a reasonable interpretation of the statute and consistent with its purposes. In addition, the regulation fully comports

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worksite is less than 50." 29 U.S.C. 2611(2)(B)(ii). This provision is implemented by section 825.110(a)(3) of the regulations, and is hereinafter referred to as "the 50/75 requirement."

[2] The FMLA regulations governing joint employment specify that the "primary employer" determination includes consideration of the "authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits." 29 C.F.R. 825.106(c).

with the statement in the House and Senate Reports that the term "worksite" should be construed in accordance with the interpretation of the term "single site of employment" under the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. 2101 et seq., and its implementing regulations (20 C.F.R. Part 639). Thus, the district court's decision should be affirmed.

STATEMENT OF THE CASE

A. Statement of Facts

From November 1994 through February 1999, Harbert worked as a housekeeping and laundry supervisor at a nursing home operated by Sunset Manor Inc. ("Sunset Manor"), located in Brush, Colorado. Appendix ("App.") 34. Initially, she worked directly for the nursing home, but she became an HSG employee in November 1997, when Sunset Manor contracted with HSG for the provision of its housekeeping and laundry services, including all management, supervision, labor and materials necessary

to perform these services.[3] App. 21-22. HSG hired Harbert to be its account manager at the nursing home.[4] App. 22. Once HSG hired Harbert, the firm assumed all responsibility for retaining, transferring, or firing her, as well as for paying her salary and providing all her benefits. App. 48. As an HSG employee, Harbert reported to a district manager at HSG's office in Golden, Colorado and attended account manager meetings there. App. 22, 48.

HSG's regional office in Golden is located more than 75 miles from Sunset Manor. App. 27. During the time period in question, HSG employed fewer than 50 employees within 75 miles of Sunset Manor, but employed more than 50 employees within 75 miles of its regional office in Golden. Id.

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[3] HSG is a large national company with several hundred employees in the Denver metro area, which includes Golden. App. 33 n.1.

[4] According to the stipulated facts, "Account Managers work at the Account they are assigned to and report to District Managers." App. 22.

In November 1998, Harbert injured her hip, had a medical examination, and requested a leave of absence. App. 23. In December 1998, HSG granted her 30 days of company leave. Id. In January 1999, she notified her supervisor at HSG that she was as yet unable to return to work, and requested FMLA leave, which HSG denied. App. 24. HSG maintained that Harbert was not an eligible employee entitled to leave under the Act because HSG did not employ 50 or more employees within 75 miles of the Sunset Manor site. Id.

Instead, HSG offered Harbert a second 30-day leave, which she took. App. 47. At the end of the second 30-day leave, she expressed a desire to return to work to her HSG supervisor, who informed her that she could return when she was "100%." App. 24. At that point, she had been on leave for approximately nine weeks. App. 36. On February 20, 1999, Harbert was terminated by HSG for noncompliance with the requirements of her 30-day leave. App. 26.

B. The District Court Decisions

1. On September 28, 2001, the district court denied cross motions for summary judgment, finding that questions of fact remained concerning whether HSG and Sunset Manor jointly employed Harbert within the meaning of the FMLA's joint employment regulations, 29 C.F.R. 825.106(a). See Harbert v. Health Care Services Group, Inc., 173 F. Supp.2d 1101 (D. Colo. 2001); App. 33-42. Additionally, the court rejected HSG's argument that irrespective of the joint employment issue, Harbert was ineligible for FMLA leave because section 825.111(a)(3) is invalid. See 173 F. Supp.2d at 1106; App. 41.

Applying the standards enunciated in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), for evaluating the validity of an agency's statutory interpretation, the district court concluded that the regulation at 29 C.F.R. 825.111(a)(3) does not contradict the terms of the FMLA. See 173 F. Supp.2d at 1106; App. 41. The court

noted that the statute does not contain a definition of the term "worksite" and that Congress delegated the authority to the Labor Department to elucidate the term by regulation. Id. In the court's view, the regulatory definition of the term in the context of joint employment is a permissible construction of the statute, and is thus entitled to controlling weight under Chevron. Id.

2. After a trial, the district court issued its Findings Of Fact, Conclusions Of Law and Order on March 13, 2003. App. 43-53. The court determined that HSG and Sunset Manor jointly employed Harbert. App. 50.[5] Also, applying section 825.111(a)(3), which the court reiterated is valid, the court concluded that Harbert's worksite, for eligibility purposes, was HSG's regional office in Golden, Colorado, where HSG employed more than 50 employees within 75 miles. See App. 51. Thus, at the time of her FMLA leave request, Harbert had met

[5] HSG has never disputed that it was Harbert's primary employer within the meaning of the FMLA regulations. See HSG Brief 9; App. 38 n.6.

the 50/75 requirement, and HSG had improperly denied her FMLA leave. The court awarded Harbert back wages, liquidated damages, reasonable attorney's fees, court costs, and front pay in lieu of reinstatement. App. 52-53.

SUMMARY OF ARGUMENT

The district court correctly upheld the Secretary's regulatory definition of "worksite" in the joint employment context. The FMLA regulation is valid under the second part of the analysis articulated in Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984), for determining a regulation's validity. As the district court recognized, "worksite" is not defined in FMLA. The Secretary made a reasonable decision in adopting an approach modeled on section 639.3(i)(6) of the WARN Act regulations, which provides that the "single site of employment" for traveling and outstationed employees is the site "to which they are assigned as their home base, from which their work is assigned, or to which they report." 20

C.F.R. 639.3(i)(6). The Secretary designated that, for purposes of eligibility under the FMLA, a joint employee's "worksite" is the office of the primary employer "from which the employee is assigned or reports." 29 C.F.R. 825.111(a)(3). Like the WARN Act regulation, section 825.111(a)(3) accepts the notion that employees can have a "worksite" other than the place at which they regularly perform their work. Many joint employees, particularly those assigned by a temporary help agency or staffing firm, fall within the description of employees to which section 639.3(i)(6) applies, i.e., traveling and outstationed employees.

The regulation does not contradict the language of the statute. The regulation is also fully consistent with statements in the congressional reports that accompanied the FMLA. These reports clearly state that the term "worksite" should be interpreted in the same manner as "single site of employment" under the WARN Act and its regulations. See S. Rep. No. 103-3, 103d Cong., 1st Sess., reprinted in 1993 U.S.C.A.A.N. 3, 25;

H.R. Rep. No. 103-8(I), at 35 (1993). Notwithstanding the somewhat different formulation from the WARN Act regulation, section 825.111(a)(3) is fully consistent with these congressional statements.

Finally, the regulation does not contravene the statutory purposes. The goal of the 50/75 requirement is to ease the burden on small business operations of having to assign employees to geographically disparate locations when an employee takes leave. Joint employment typically involves temporary help agencies or leasing firms which routinely, as part of their business, assign employees to many different workplaces. Thus, the purpose of the 50/75 requirement is not seriously infringed by designating the primary employer's office from which the employee is assigned or reports as the FMLA "worksite." The regulation is also consistent with the statute's goal of providing coverage to as many employees as possible. In addition, the designation of the primary employer's office as the "worksite" eliminates uncertainty and

confusion for joint employers and employees alike because it prevents the employee's FMLA eligibility from varying, depending on where the employee is assigned to work. In sum, section 825.111(a)(3) is valid under the Chevron analysis because it provides a permissible definition of the term "worksite" in the context of a joint employment relationship.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE SECRETARY'S REGULATION DEFINING "WORKSITE" IN THE CONTEXT OF JOINT EMPLOYMENT TO BE THE PRIMARY EMPLOYER'S OFFICE IS VALID.

A. Pertinent Statutory and Regulatory Provisions

Section 102(a)(1)(D) of the FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year, with continued group health insurance coverage, "because of [among other things] a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. 2612(a)(1)(D). An eligible employee is an employee who has been employed "(i) for a least 12 months by the

employer ... ; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." Id. at 2611(2)(A)(i), (ii). The Act, however, excludes an employee from eligibility unless she "is employed at a worksite at which the employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." Id. at 2611(2)(B)(ii); see also 29 C.F.R. 825.110(a)(3) (an eligible employee "[i]s employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite").

The statute does not define the term "worksite." The Secretary made a reasonable decision in adopting an approach based upon the definitions of "worksite" already found in the WARN Act and accompanying regulations. The legislative history of FMLA explains:

> The term 'worksite' is intended to be construed in the same manner as the term 'single site of employment' under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. 2101(a)(3)(B), and regulations under that Act (20 CFR Part 639). Where employees have no fixed

> worksite, as is the case for many construction workers, transportation workers, and salespersons, such employees' "worksite" should be construed to mean the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report.

S. Rep. No. 103-3, 103d Cong., 1st Sess., reprinted in 1993 U.S.C.A.A.N. 3, 25. See also H. R. Rep. No. 103-8(I), at 35 (1993) (virtually the same).

The WARN Act requires employers to provide workers 60 days advance notice of plant closings and mass layoffs if 50 or more employees are affected at a "single site of employment." 29 U.S.C. 2101(a)(2), 2102(a). Section 2101(a)(3)(B) of the statute, cited in the FMLA legislative history, comprises part of the definition of the statutory phrase "mass layoff." Section 2101(a)(3) provides:

> mass layoff means a reduction in force which -- (A) is not the result of a plant closing; and (B) results in an employment loss at the single site of employment during any 30-day period for -- (i)(I) at least 33 percent of the employees (excluding any part-time employees); and (II) at least 50 employees (excluding any part-time employees); or

> (ii) at least 500 employees (excluding any part-time employees).[6]

29 U.S.C. 2101(a)(3).

The WARN Act does not define the term "single site of employment," but the implementing regulations provide a comprehensive definition, consisting of eight subsections, at 20 C.F.R. 639.3(i). In pertinent part, these regulations provide:

> For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

20 C.F.R. 639.3(i)(6). Section 825.111(a)(2) of the FMLA regulations, which applies to employees without a fixed worksite, similarly provides:

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[6] The WARN Act states that "the term 'plant closing' means the permanent or temporary shutdown of a single site of employment . . . if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees." 29 U.S.C. 2101(a)(2).

> For employees with no fixed worksite, e.g., construction workers, transportation workers (e.g., truck drivers, seamen, pilots), salespersons, etc., the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report.

29 C.F.R. 825.111(a)(2).[7]

Unlike 20 C.F.R. 639.3(i)(6), section 825.111(a)(2) omits any reference to "outstationed" employees.

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[7] Section 825.111(a)(2) provides several examples of how the definition is applied. The first example involves a construction company headquartered in New Jersey that has an on-site office on its construction site in Ohio. The regulation states that the Ohio construction site would be the worksite for employees hired locally in Ohio who daily report to the on-site office for their work assignments. On the other hand, employees, such as job superintendents, foremen, engineers, and an office manager sent from New Jersey to the Ohio job site would have the New Jersey headquarters as their worksite.

In the case of transportation workers, the regulation notes that, for example, an airline pilot employed by an airline headquartered in New York, but who regularly reports for duty to the company's facilities at an airport in Chicago and returns there at the end of the day's flights, has the airline's Chicago facility as his or her worksite. The regulation also provides that in the case of traveling salespersons, who travel a sales territory and generally leave to work and return from work to their residences and, employees who work at home, their worksite is the office to which they report and from which assignments are made.

Instead, there is a subsequent section, 825.111(a)(3), pertaining to the joint employment context, which states:

> For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (see § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

29 C.F.R. 825.111(a)(3).[8] This joint employment worksite regulation adopts, with slight modification,

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[8] Under the FMLA regulations, the primary employer bears sole responsibility for giving required notices, providing FMLA leave, and for maintaining health benefits. 29 C.F.R. 825.106(c). The primary employer also has primary responsibility for the employee's job restoration. Id. at 825.106(e). The "secondary" employer must accept the employee returning from leave if it still uses the services of the primary employer and the primary employer chooses to place the employee with the secondary employer. Also, the secondary employer is prohibited from interfering with the employee's rights under the Act, or discriminating against such an employee. Id.

the WARN Act definition of "single site of employment" in section 639.3(i)(6) of that statute's regulations.[9]

B. Under the Chevron Analysis, the Secretary's Regulatory Definition of the Joint Employment Worksite is Valid because it is a Permissible Construction of the Statute.

1. The Secretary's regulation defining the joint employment worksite is valid under the principles of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).[10] In Chevron, the Supreme Court enunciated a two-part analysis for

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[9] The preamble to the final FMLA regulations reflects that the legislative history guided the Department in drafting the regulatory definition of "worksite." See 60 Fed. Reg. 2180, 2187 (1995) (noting that the provision designating the worksite of temporary employees (presumably section 825.111(a)(3)), as the site from which their work is assigned (i.e., the temporary help agency's office) "is required by the express intention of the Congress in the committee reports that the WARN Act regulations be used to determine 'worksite'"); id. at 2189 (stressing that "FMLA's legislative history explains . . . the term 'worksite' is intended to be construed in the same manner as the term 'single site of employment' under the Warn Act regulations").

[10] This Court's recognizes that its review of a regulatory challenge is guided by the Chevron analysis. See Public Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999), aff'd, 529 U.S. 728 (2000).

evaluating the validity of an agency's regulation interpreting the statute entrusted to its administration. Under the analysis, the first consideration is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." 467 U.S. at 842. The intent of Congress may be discerned not only by the statutory language, but by application of the "traditional tools of statutory construction," including legislative history. *Id.* at 843 n.9.[11] If, however, the statute is silent or ambiguous with respect to the issue, "the question for the court is whether the agency's answer is a permissible construction of the statute." *Id.* at 843. The court must defer to the agency's construction of the statute,

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[11] In *Chevron*, the Court examined not only the text of the Clean Air Act Amendments of 1977, but also their legislative history, in an effort to ascertain congressional intent concerning the meaning of the statutory phrase "stationary source." 467 U.S. at 859-62.

unless it is "arbitrary capricious, or manifestly contrary to the statute." Id. at 844.

The district court analyzed 29 C.F.R. 825.111(a)(3)'s validity under the second prong of the Chevron framework. Applying this analysis, the FMLA is silent on the proper construction of "worksite," and the Secretary's "worksite" regulations, adapted from the WARN Act, are a permissible construction of the statute. While the WARN Act "single site of employment" regulations make no mention of joint employment, they define the "single site of employment" for employees "whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites." 20 C.F.R. 639.3(i)(6). Many employees who are jointly employed, particularly by a staffing firm and another employer, may fit into one or more of these categories of employees.[12] Section

[12] As HSG concedes (HSG Brief 23), joint employment relationships may involve employees who have no fixed

639.3(i)(6) envisions that workers without a fixed worksite may have a "site of employment" that is a location other than where they perform their work.[13] The WARN Act regulation also contemplates that "outstationed" employees who, like Harbert, have fixed places of employment may, for regulatory purposes, have worksites that differ from their usual workplaces.[14]

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workplace, as well as those, like Harbert, who are stationed at a single location.

[13] Courts applying section 639.3(i)(6) have recognized that mobile workers may have a site of employment that is different from their workplace. See Ciarlante v. Brown & Williamson Tobacco Corp., 143 F.3d 139 (3d Cir. 1998) (in case of traveling sales people, material factual issues remained concerning whether "site of employment" was the district in which they worked or employer's administrative center); Wiltz v. M/G Transport Services, Inc., 128 F.3d 957 (6th Cir. 1997) ("site of employment" of towboat crews working on Ohio, Mississippi, and Tennessee Rivers was company's central office in Paducah, Kentucky). But cf. Teamsters Local Union 413 v. Drivers' Inc., 101 F.3d 1107 (6th Cir. 1996) (truck drivers' "site[s] of employment" were employer's individual terminals, where they started and ended their day, and where daily operations were conducted, not company's central offices in Delaware, Ohio).

[14] While there are no cases defining the regulatory term "outstationed," the dictionary defines an

See 54 Fed. Reg. 16,042, 16051 (1989) (preamble to the WARN Act regulations explaining that the regulation covers "outstationed workers and traveling workers who report to but do not work out of a particular office). See also Kephart v. Data Systems International, Inc., 243 F. Supp.2d 1205, 1219-23 (D. Kan. 2003) (issues of material fact existed as to whether "outstationed" employees' "single site of employment" was corporate headquarters or home or regional offices in which they worked). Cf. Wiltz, 128 F.3d at 962 (crew's length of stay on towboat did not establish that boat is worksite, observing that "outstationed" employees, who, like towboat crew, will live for some period at the place where they are stationed, also come within 20 C.F.R. 639.3(i)(6)).[15]

"outstation" as a "remote station or post." Webster's II New Riverside Univ. Dictionary 836 (1984).

[15] The challenged regulation (29 C.F.R. 825.111(a)(3)) is consonant with the Secretary's description of a "primary employer" in the regulation governing FMLA joint employment, 29 C.F.R. 825.106(c). Under the latter regulation, the factors to be considered in determining the primary employer

2. On appeal, HSG argues (HSG Brief 18-24) that section 825.111(a)(3) is inconsistent with congressional intent. In this regard, HSG interprets the pertinent legislative history as evincing a congressional intent to apply section 639.3(i)(6)'s definition only in cases where employees have no fixed worksite. HSG contends that since the absence of a fixed worksite is not characteristic of every joint employment situation, section 825.111(a)(3) contravenes Congress' directive.

HSG's argument lacks merit. While apparently conceding that the Secretary could properly adapt

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"include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits." Id. This regulation also states that "for employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer." Id. In the challenged regulation, for purposes of determining employee eligibility, the Secretary determined that this primary employer's office is the employee's "worksite." 29 C.F.R. 825.111(a)(3). The Secretary reasonably decided that the focus of FMLA responsibilities should be on the primary employer. This conclusion was based on her determination that the primary employer "is in the best position to provide

section 639.3(i)(6) for the FMLA regulations in cases of joint employment where there is no fixed worksite, HSG ignores the fact that section 639.3(i)(6) not only defines "single site of employment" in the context of employees who have no fixed worksite, i.e., "workers whose primary duties require travel from point to point" or "whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons)" (20 C.F.R. 639.3(i)(6)), but also defines the phrase for employees "who are outstationed." Id. The preamble to the WARN Act regulations discloses that section 639.3(i)(6) covers both "outstationed workers and traveling workers who report to but do not work out of a particular office." See 54 Fed. Reg. at 16,051. The term "outstationed" reasonably was interpreted by the Secretary to encompass employees, such as Harbert, who are assigned or provided to a fixed site from a company headquarters or regional office. The Secretary

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the rights and benefits of the Act." 60 Fed. Reg.

reasonably adapted this portion of the WARN Act regulation when promulgating the challenged regulation. Thus, the regulation is fully consistent with pertinent statements in the congressional reports that the WARN Act regulations be used to define the term "worksite," particularly as those regulations apply in the circumstances of this case.

3. HSG also argues that since the underlying purpose of the 50/75 requirement is to alleviate the difficulties that an employer might experience in reassigning workers to geographically separate facilities when an employee takes leave,[16] the regulation may thwart this purpose where the "home" office of the primary employer is located at a great

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2,180, 2,183 (1995).

[16] See Moreau v. Air France, 343 F.3d 1179, 1182 (9th Cir. 2003) (noting that the 50/75 rule "was created for 'small operations' -- that is, a potentially large company with a relatively small satellite office in a particular area."); 58 Fed. Reg. 31794, 31798 (1993)(preamble to interim FMLA regulations).

distance, for example, more than 1000 miles, from the place where the employee is working.[17]

The same argument, however, can be made in the case of employees who have no fixed worksite, for example, construction workers assigned from a company headquarters to many different, remote construction sites. Yet HSG seems to concede, as it must, that the regulation properly encompasses such workers.[18]

Moreover, under the facts of this case, it is entirely reasonable that HSG's office be Harbert's "worksite" for FMLA purposes. HSG assigned Harbert from its office to the nursing home as its account manager and had the authority to fire or transfer Harbert to another work location. See App. 22, 48.

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[17] That is not the case here. HSG's regional office is located only 105 miles from the Sunset Manor nursing home. See HSG Brief 26.

[18] Indeed the congressional reports state that in the case of workers without a fixed worksite that for purposes of the FMLA, "'worksite' should be construed to mean the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report." S. Rep. No. 103-3,

Harbert regularly reported to HSG's district manager at its district office through telephone calls and written reports and, sometimes, in monthly meetings at that office. App. 22, 55-57, 83-84; HSG Brief 6. Cf. Wiltz v. M/G Transport Services, Inc., 128 F.3d 957, 960-62 (6th Cir. 1997) ("single site of employment" under section 639.3(i)(6) for towboat employees working on boats covering 2000-mile span of Ohio, Mississippi, and Tennessee River systems was not the towboats, but the employer's Kentucky headquarters, from which all assignments to boats were made and to which employees reported to port engineer or port captain).

Also, in the case of primary employers who, like HSG, routinely place workers with other employers, it is not unreasonable to assume that it will normally be less difficult for such primary employers to reassign employees to geographically disparate locations since such employers are in the business of regularly staffing other employers' workplaces. Thus, the

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103d Cong., 1st Sess., reprinted in 1993 U.S.C.A.A.N.

underlying reason for the 50/75 requirement is not significantly compromised by considering employees such as Harbert to be employed at the primary employer's worksite, even though their regular workplace is beyond the 75-mile limit of the eligibility requirement.

As a practical matter, designating the primary employer's office as the worksite results in certainty for both joint employers and employees. Because joint employment typically involves temporary or leased employees who may work for more than one secondary employer during a week, designating the secondary employer's location as the FMLA worksite likely would result in employees falling in and out of FMLA eligibility daily or weekly, depending on where they are assigned to work. Such consequences would be burdensome for employers and employees alike.

In sum, the Secretary's regulation is valid under the second prong of Chevron because it is reasonable, consistent with statutory purposes and legislative

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3, 25; H.R. Rep. No. 103-8(I), at 35 (1993).

intent, and not in conflict with the statute's plain meaning. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291-92 (1988).

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the decision of the district court.

Respectfully submitted,

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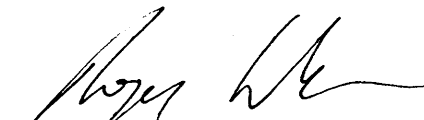

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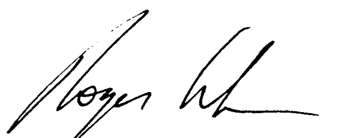

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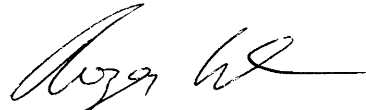

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